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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-803

WILLIAM G. BARRY, as Chairman of the New York State Racing and Wagering Board, et al.,

*Appellants,*

-against-

JOHN BARCHI,

*Appellee.*

On Appeal from the United States District Court
For the Southern District of New York

## BRIEF FOR APPELLEE

GRECO & FARALDO
Attorneys for Appellee
125-10 Queens Boulevard
Kew Gardens, N.Y. 11415
(212) 544-6800

JOSEPH A. FARALDO,
Of Counsel

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

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**IN THE**
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## BRIEF FOR APPELLEE

## PRELIMINARY STATEMENT

Appellee submits this brief in support of the judgment of a three judge Court entered on the 5th day of September, 1977 in the Southern District of New York declaring Section 8022 of the Unconsolidated Laws of the State of New York to be Unconstitutional to the extent that it allows the New York State Racing & Wagering Board to suspend a licensee for cause, without a prior hearing on the charges. *Barchi v. Sarafan,* 436 F. Supp. 775 (S.D.N.Y., 1977).

## QUESTIONS PRESENTED

1. Is Due Process of Law violated where a State Administrative Agency deprives a licensee of his right to earn a livelihood for cause, prior to suspension hearing, on the charges?

2. Is a State statutory classification rational, within the meaning of Equal Protection of Law, that authorizes a stay of suspension against a licensee engaged in thoroughbred racing, but not a licensee engaged in harness racing, pending administrative review?

3. Is there a Due Process of Law rational connection between the fact that medication was administered to a horse within forty-eight hours of a race and the administrative presumption that it was caused by the intentional or negligent act of the horse's trainer, when others, including State racing officials have the same right of access to the animal during that period?

## SUMMARY OF ARGUMENT

### I

Due Process of Law is violated by a State statutory scheme that authorizes the revocation or suspension of the Constitutionally protected private right to work in a licensed occupation to wit, training harness racing horses without a prior hearing, which results in irreparable loss of income and of business continuity, and the risk of an erroneous deprivation is great. *Matthews v. Eldridge,* 424 U.S. 319 (1976).

Since all of such summary revocations or suspensions of necessity occur after the incident in issue and often times days or weeks later, there is no emergency basis for a summary suspension or license revocation without a prior hearing and the interest of the State can adequately be



served by the normal procedure indigenous to other licensed occupations and professions, by delaying punishment, until after the hearing and decision making process runs its course. *Goss v. Lopez,* 419 U.S. 565 (1975).

### II

Equal protection of law is violated by a State regulatory scheme that prohibits stays of license revocation or suspension to harness racing licensees but not to thoroughbred racing licensees, since there is no reasonable distinction between the two classes of licensees. *Stanley v. Illinois,* 405 U.S. 645 (1971).

### III

Due Process of law is violated by an administrative presumption that the trainer of a horse was guilty of negligence or intentionally wrongful conduct drawn from the fact that the horse trained by him allegedly proved to be drugged within forty-eight hours of a race, where the trainer does not have the right to exclusive possession and control of the horse during this time and may not exclude racing officials, employees of the race track, other trainers, drivers, grooms and members of the public from the area where the horse is kept. There is no rational connection between the fact proven and the fact to be presumed. *Tot v. United States,* 319 U.S. 463 (1943); *Allen v. County Court, Ulster County,* 568 F.2d 998 (2nd Cir., 1977).

### IV

Where a State statute or regulation is under challenge, and there is no action pending in State Court where the issue can be litigated and no need for a State Court inter-

pretation of its clear language, the State's highest court having construed it, and the statute or regulation does not involve a complex State rate making or taxation scheme, 42 U.S.C. 1983 allows the Appellee to select a Federal Court to litigate his claim and Federal abstention under such circumstances would constitute an abuse of discretion. *Monroe v. Pape,* 365 U.S. 658 (1961); *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964); *Carey v. Sugar,* 425 U.S. 73 (1976).

## STATEMENT OF THE CASE

Appellee, JOHN BARCHI is a licensed harness racing trainer, pursuant to Rule 4101.24[1] of the Rules of the New York State Racing & Wagering Board. On the 22nd day of June, 1976, a horse trained by him, "BE ALERT,"

1. 9 NYCRR §4101.24 in pertinent part provides as follows:

*4101.24 Occupational licenses. (a)* No person shall participate in the affairs of any association or corporation licensed by the New York State Harness Racing Commission to conduct harness race meetings at which pari-mutuel betting is permitted as director, agent, or employee of such track licensee, unless such person shall have received an occupational license from the commission.

(b) No person shall participate in or at any harness horse race meet as owner, driver, trainer, assistant trainer, groom, farrier, harness goods supplier, salesman, veterinarian, agent, or be the holder or operator of any concession, or perform any service, including but without limiting the generality thereof, the conduct of negotiations on behalf of any person or persons who engage in any racing activities or perform any services in connection with the conduct of any harness horse race meet, or engage in any occupation or employment at any harness horse race meet, unless such person shall have received an occupational license from the commission, with the following exceptions:

(1) Public officers and public employees engaged in the performance of their official duties.

(2) Persons exempted by the commission from the occupational license requirement.

(c) It shall be the responsibility of each track licensee to prevent any person not holding an occupational license from doing or performing any act or acts at its track.



placed second in the third race at Monticello Raceway in New York State. (6a)*

On June 24th, two days later, Appellee was given notice by John F. Fay, the official Steward-Presiding Judge of the New York State Racing & Wagering Board at Monticello that urine tests had revealed that "BE ALERT" had been improperly treated with the drug "Lasix" in violation of Rule 4120.4[2] of the Rules of the New York State Racing & Wagering Board, that prohibits such treatment within forty eight hours of a race. (6a-7a).

Realizing the seriousness of the charges and the impact it might have on his livelihood, Appellee voluntarily underwent a lie detector test on the 28th day of June, 1976 administered by Victor C. Kaufman of the New York Lie Detection Laboratories, who issued a written report that Appellee was truthful in his denial that he had administered the drug to the animal charged to him. (7a, 17a-18a).

On the 29th day of June, 1976, the New York State Racing & Wagering Board had its own lie detector test administered to Appellee, the results of which likewise in-

*Page references to the appendix are indicated by numbers followed by "a"; page references to the appendix to the Jurisdictional Statement are indicated "J.S. a".

2. 9 NYCRR §4120.4—

*4120.4 Prohibition.* No person shall, or attempt to, or shall conspire with another or others to:

(a) Stimulate or depress a horse through the administration of any drug, medication, stimulant, depressant, hypnotic or narcotic.

(b) Use any electrical device or any electrical equipment or any mechanical or other appliance not generally accepted as regulation racing equipment to stimulate, depress, goad, spur or retard a horse during a race, a warm-up in preparation therefor, or in the paddock before a race.

(c) Freeze or ice a horse's leg or legs within the paddock area on the day in which such horse is programmed to race.

(d) Administer any drug, medicant, stimulant, depressant, narcotic or hypnotic to a horse within 48 hours of its race.

dicated that he was truthful when he stated he knew nothing about the administration of "Lasix" to "BE ALERT."

Nevertheless, and effective on the 10th day of July, 1976, some eighteen (18) days after the race, the New York State Racing & Wagering Board suspended Appellee and all horses owned or trained by him, for fifteen (15) days without a prior hearing for violation of Rules 4120.5,[3] and 4120.6[4] and 4116.11[5] of the agency. (29a). The New York State Racing & Wagering Board drew upon Section 8022 of the Unconsolidated Laws of the State of New York for

3. 9 NYCRR

*4120.5 Presumptions.* Whenever the test or tests prescribed in section 4120.1 hereof disclose the presence in any horse of any drug, stimulant, depressant or sedative, in any amount whatsoever, it shall be presumed:

(a) that the same was administered by a person or persons having the control and/or care and/or custody of such horse with the intent thereby to affect the speed or condition of such horse and the result of the race in which it participated;

(b) that it was administered within the period prohibited by subdivision (d) of section 4120.4 of this Part; and

(c) that a sufficient quantity was administered to affect the speed or condition of such animal.

4. 9 NYCRR

*4120.6 Trainers' responsibility.* A trainer shall be responsible at all times for the condition of all horses trained by him. No trainer shall start a horse or permit a horse in his custody to be started if he knows, or if by the exercise of reasonable care he might have known or have cause to believe, that the horse has received any drug, stimulant, sedative, depressant, medicine, or other substance that could result in a positive test. Every trainer must guard or cause to be guarded each horse trained by him in such manner and for such period of time prior to racing the horse so as to prevent any person not employed by or connected with the owner or trainer from administering any drug, stimulant, sedative, depressant, or other substance resulting in a positive test.

5. 9 NYCRR

*4116.11 Trainer's responsibility.* A trainer is responsible for the condition, fitness, equipment, and soundness of each horse at the time it is declared to race and thereafter when it starts in a race.



its authority to suspend Appellee without a hearing, which provides as follows:

> "If the State harness racing commission shall refuse to grant a license applied for under this act, or shall revoke or suspend such a license granted by it, or shall impose a monetary fine upon a participant in harness racing the applicant or licensee or party fined may demand, within ten days after notice of the said act of the commission, a hearing before the commission and the commission shall give prompt notice of a time and place for such hearing at which the commission will hear such applicant or licensee or party fined in reference thereto. Pending such hearing and final determination thereon, the action of the commission in refusing to grant or in revoking or suspending a license or in imposing a monetary fine shall remain in full force and effect." (8a).

On the 12th day of July, 1976, Appellee commenced this action pursuant to 42 U.S.C. 1983 to enjoin the enforcement of the suspension against him, which, in effect deprived him of his right to earn a livelihood, without a prior hearing on the charges of misconduct against him, which he claimed to be in violation of his Constitutional rights to Due Process and Equal Protection of Law secured by the Fourteenth Amendment. (5a). Appellee moved for provisional relief to temporarily enjoin, stay and prohibit enforcement of the fifteen (15) day suspension of his trainer's license, pending determination of the action and for a temporary restraining order, pending determination of the motion for a temporary injunction. District Court Judge Robert J. Ward signed the temporary restraining order on the day it was presented to him, on condition that Appellee post a bond in the sum of $1,500.00, which was posted, thereby staying enforcement of the suspension. (21a-22a).

In support of the motion for provisional relief, Ap-

pellee submitted his affidavit, reciting that he is a harness racing trainer, licensed by the New York State Racing & Wagering Board and trains horses at Monticello Raceway, among which is "BE ALERT", owned by one Walter Littman. (23a).

He alleged that on the 22nd day of June, 1976, "BE ALERT" participated in the third race at Monticello Raceway, placing second. Two days later, he was summoned to the office of John F. Fay, the official Steward-Presiding Judge appointed by the New York State Racing & Wagering Board to supervise all race meets at Monticello Raceway and was told that a urine test had revealed the horse had been improperly treated with the drug Lasix, in violation of Rule 4120.4[6] of the agency, that prohibits such treatment of a horse within forty-eight hours of a race. The investigation was assigned to Daniel Goldberg, the Chief Investigator of the Board.

Appellee explained in his affidavit that "Lasix" is a drug commonly used to clear the sinus cavity of a horse and if administered shortly before a race, it will increase his endurance and therefore, his performance. (24a).

Appellee pointed out in his affidavit that he was never confronted with the urine specimen of "BE ALERT," nor the circumstances under which it was taken. Such confrontation would be material, in that often, these specimens are drawn from numerous horses at the same time, with a strong possibility of a mixup in labeling or in sample testing as is always at risk.

Aware that Section 8022 of the Unconsolidated Laws of the State of New York authorizes a suspension of his license and therefore, of his right to pursue his occupation, without a hearing, on the 28th day of June, 1976, in an effort to convince the Board that he had no complicity in the illegal administration of the medication to the horse,

6. See Note 2, supra.



he voluntarily underwent a lie detector test, which reflected that he was truthful in his responses, that he had no knowledge of the improper medication of the horse. (24a) The following day, at the request of the Board, Appellee underwent a second lie detector test, which he was informed he likewise passed.

Nevertheless, effective July 10, 1976, the Board suspended Appellee for fifteen days, without affording him any type of prior hearing.

In his affidavit, Appellee recited the irreparable injury he would suffer, unless he be granted provisional relief, pending determination of the action.

The affidavit recites that a suspension can and often does cost a trainer his clientele of owners, who hire him to train their horses. The owners must hire new trainers during a period of suspension, since there can be no hiatus in the care of a horse, which includes feeding, training and racing. Thus, there is a great risk that an owner will make new ties and not return to a suspended trainer, even after the suspension expires. Moreover, the bulk of a trainer's income is derived during the racing meet, since it is then that he has opportunity to earn a percentage of the purses earned by the horses under his tutelage. A suspension most times results in irreparable injury for which a licensee has no adequate remedy at law. A trainer or trainer-driver in addition to a daily fee receives a percentage of the purse monies horses entrusted to his care earn in races. There is no remedy for him to make up loss of income and clientele, should it develop at a subsequent hearing that the suspension was improperly imposed. (25a)

In addition, in his affidavit, Appellee challenged the Constitutionality of the Trainer's Responsibility Rule,[7] promulgated by the Board, which raises an inference that the drugging of a horse, resulted either from the inten-

7. See Notes 3, 4 and 5 supra.

tional or negligent act of its trainer, pointing out the lack of rational connection between the fact of wrongful or negligent conduct to be inferred from the fact proven, to wit; improper medication of the animal within forty-eight hours of the race. Appellee pointed out that it is not possible to guard the animal for forty-eight consecutive hours and that race track rules afford grooms, owners, security personnel, race track personnel and even officials of the New York State Racing & Wagering board access to barn area stalls and the paddock, where the horses are housed. Even a member of the public can gain such access. It is conceivable that a dishonest official of the New York State Racing and Wagering Board, grooms from other stables, other owners, other trainers among a host of others, might take advantage of their access to the barns and paddock to medicate a horse on which they had made a sizeable bet or to put a trainer out of business. Thus, the administrative rule creating an evidentiary shortcut is Constitutionally unacceptable, especially where the application of the presumption can produce such dire consequences, to wit; the loss of a licensee's livelihood in a Constitutionally protected occupation. (27a)

In addition, the affidavit of JOSEPH A. FARALDO, Attorney for the Appellee, sworn to the 19th day of July, 1976 recited that he had represented numerous trainers, in thoroughbred and harness racing, charged with violation of the Rules of the New York State Racing & Wagering Board and that in respect of the latter, stays of execution of the suspension, pending administrative review by the Board, are never granted, while in respect to the former licensees, (thoroughbred), they are granted and pointed out that Section 8022 of the Unconsolidated Laws of the State of New York governing procedure for license suspension or revocation for harness racing licensees prohibits a stay pending administrative review, while Section 7915 of the Unconsolidated Laws of the State of New



York governing procedure for license suspension or revocation for thoroughbred licensees does not prohibit such stay, pending administrative review, thereby stamping Section 8022 with a second Constitutional infirmity, that is, violation of the Equal Protection of Law safeguard of the Fourteenth Amendment. (30a-31a).

In opposition to the motion for provisional relief was the affidavit of John M. Dailey, counsel to the New York State Racing & Wagering Board and its Supervising Steward, sworn to the 26th day of August, 1976. In it he explained the suspension of Appellee:

> "In Barchi's case, an unsuccessful attempt had been made to determine the actual party responsible for drugging his horse. When this proved impossible, Barchi was suspended on the basis of his trainer's responsibility . . . . Immediate action was necessary . . . to protect the integrity and reputation of the sport and to insure public confidence. Historically both the tracks and the State authorities have found it imperative that harness racing be conducted fairly both in fact and in appearance. In the past, even the appearance of impropriety has resulted in disorders at the track and jeopardy to the safety of members of the public and the industry." (33a)

He further alleged that, despite the prohibitory language of Section 8022, *supra*, often times the Board will stay the Steward's suspension, pending administrative review, without reciting the criteria used for determining whether to grant such administrative stay or giving specific examples in view of the fact that it would necessarily have to be granted without a hearing. He further urged that any doubt concerning the validity of the State statutes should be resolved by State courts and the Federal court should abstain. (34a)

Mr. Dailey further urged in his affidavit that there is a rational basis for the more harsh procedural treatment af-

forded to harness racing licensees as compared with thoroughbred racing licensees. Harness racing horses are put on three (3) days' notice of their selection for a given racing program, while thoroughbred horses are selected with but one (1) day's notice. Therefore, the forty-eight hour rule against administration of medication can only be applied to harness racing horses. Moreover, harness racing horses are brought into the paddock, which he claims to be a secured area under State supervision (overlooking the fact that State officials as well as race track employees have access to these animals as well as their trainers) on the day of the race (without detailing the number of hours prior to the race they are brought there), at which time pre-race blood analyses are taken of the animals to check for improper medication. Mr. Dailey recites that thoroughbred horses are "too skittish" to be kept in a paddock together for any length of time and so, are brought there on the immediate eve of the race, with no time for pre-race blood testing. (Post race urine tests are conducted on thoroughbred and harness horses and are more sensitive than blood tests.) He further states that "while it is possible for a drug not to be detected by a pre-race test, in harness racing the probabilities are stronger that if a post-race test uncovers drugs in a horse's blood or urine it is the result of an attempted fraud." (35a).

JOSEPH A. FARALDO submitted an affidavit in reply to the affidavit of Mr. Dailey, reciting that "what John Barchi received was Notice of Suspension effective immediately with the so called 'right' to file a Notice of Appeal within ten (10) days." (36a) Had he availed himself of that right, without the necessary stay, by the time an administrative appeal would be scheduled and a decision made, the fifteen (15) day suspension would have been served and the issue become moot, which is what invariably happens. That is the reason why, in April of 1976, of five (5) harness racing trainers suspended none availed



themselves of the so-called right to an administrative review. No adequate meaningful administrative remedy was ever available to them, or their predecessors. (37a).

Mr. Faraldo further pointed out that "BE ALERT" was given a pre-race blood test in the paddock by officials of the Board, which proved negative. He stated that during the three or four hour period that this horse was in the paddock, he was subject to intense security supervised by officials of the Board, concluding "that from this fact the State of New York is as responsible a party if not more so, than they claim John Barchi to be." (38a).

An affidavit was submitted by Lucien Fontaine, a harness racing driver. In 1962 in Pennsylvania, under color of similar administrative rules, he was suspended for ninety (90) days when a horse trained by him came up "positive" for a prohibited drug, allegedly administered within forty-eight hours of a race. He remained under suspension for sixty-three (63) days, the earliest time the Board could schedule a hearing. As a result, nineteen (19) of the twenty-three (23) horses under his training tutelage were lost from his stable forever, since the owners of the horses made arrangements with different trainers during the period of suspension, so that the horses would not miss racing opportunities because of Fontaine's unavailability, which arrangements became permanent. Indeed, the only four (4) horses that were not lost to other trainers during and after the suspension was served, were his own. His business was ruined. As a result, he no longer trains harness racing horses, limiting himself to driving, in view of the arbitrary power of the racing boards to destroy his business, based on no more than mere charges and without a prior hearing to determine culpability. In 1975, Fontaine received a five day suspension on a charge of a driving infraction. By the time his hearing was scheduled, he had served the suspension. He was ultimately exonerated of the charges, but there was no remedy for him to recover his loss of income. (39a-40a)

The amended complaint herein contains three causes of action. The first count challenges the Constitutionality of Section 8022 of the Unconsolidated Laws of the State of New York, for authorizing the suspension of a harness racing licensee without a prior hearing. The second count challenges the Constitutionality of the same section based upon a denial of Equal Protection of Law, by reason of the availability of an administrative stay of suspension pursuant to Section 7915 of the Unconsolidated Laws for a thoroughbred racing licensee under suspension, pending a hearing, while such remedy is statutorily prohibited and factually denied a harness racing licensee. The third count challenges the Constitutionality of the administrative presumption that the trainer of harness racing horses found to be medicated within forty-eight hours of a race is either guilty of intentional fraud or negligence in causing such condition to exist, when there is no rational connection for such conclusion, especially where racing officials among others, have just as much access to the animal as does his trainer during the crtical period.

On the 23rd day of December, 1976, District Court Judge Gerard L. Goettel convened a three judge Court to determine the Constitutionality of Section 8022 of the Unconsolidated Laws and the Trainer's Responsibility Rule, administratively promulgated. (JS23a) On the 18th day of August, 1977, a three judge court declared Section 8022 of the Unconsolidated Laws of the State of New York to be Unconstitutional but upheld the Constitutionality of the Trainer's Responsibility Rule. (JS3a) A judgment was entered on the 15th day of September, 1977 declaring the fifteen (15) day suspension imposed upon Appellee to be null and void. Appellants served and filed Notice of Appeal and probable jurisdiction was noted by this Court on the 20th day of March, 1978.



## POINT ONE

### THE NATURE OF THE PRIVATE INTEREST IN EARNING A LIVELIHOOD IS SO GREAT THAT DUE PROCESS OF LAW IS VIOLATED BY SUSPENSION OF SUCH RIGHT PRIOR TO AN ADMINISTRATIVE HEARING, WHERE THERE IS NO REMEDY FOR RECOUPMENT OF LOSSES SHOULD A SUMMARY SUSPENSION PROVE TO BE ERRONEOUS.

Certain private interests are so inherently sacred, that they may not be infringed, without the most sensitive safeguards of due process of law. They include not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of conscience, generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness. *Meyer v. Nebraska,* 262 U.S. 43 (1923).

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendments.

Essentially, the appellee was deprived of his liberty and property without the constraints imposed by procedural due process. His property being his employment; his liberty being his freedom to practice and continue in his chosen profession. These rights come within the meaning of the liberty and property concepts of the Fourteenth Amendment. The State does not contend that procedural due process is inapplicable to terminations or suspensions of the license herein issued, as has been implicit in many

prior decisions of this Court, e.g. *Vlandis v. Kline,* 412 U.S. 441 (1973); *Goss v. Lopez,* 419 U.S. 565 (1975); *Bell v. Burson,* 402 U.S. 535 (1971); *Wisconsin v. Constantineau,* 400 U.S. 433 (1971); *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969); *Slochower v. Board of Higher Education,* 350 U.S. 551 (1956); *Board of Regents v. Roth,* 408 U.S. 564 (1972).

This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. *Wolff v. McDonnell,* 418 U.S. 539 (1974). The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society *Joint Anti-Facist Comm. v. McGrath,* 341 U.S. 123 (1951).

Due process, unlike some legal rules is not a technical concept with a fixed content unrelated to time, place, and circumstances. *Cafeteria Workers v. McElroy,* 367 U.S. 886, (1961). Due process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer,* 408 U.S. 471 (1972). The fundamental requirement of due process therefore being the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965).

Appellant would have this Court hold that the interest represented by Appellee's uninterrupted enjoyment of his license, when balanced against the governmental interest sought to be protected by the summary suspension procedure embodied in section 8022, mandates that the statutory procedure be found constitutionally permissible. The State urges that to insure the public of the integrity of the racing industry, it must be granted the ability to act summarily. It points to the substantial revenue derived from racing and suggests that its inability to act promptly



when presented with potential racing violations could impair its revenue base. However, there is no proof in the record before this Court that revenues have in this case been affected where the State has been forced to stay a suspension pending an administrative hearing. Nor is there any other factual evidence presented showing a positive correlation between the amount of revenue derived and the procedural treatment of racing violations. Against this theoretical injury which might or might not come to pass, must be balanced the real injury posed to the licensee by a summary suspension of his license, as well as the probability that the findings upon which the suspension is based are later, at a plenary hearing, shown to be erroneous.

Whether due process requires an administrative hearing prior to license suspension depends upon a balancing of three factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge,* 424 U.S. 319, 334-35, (1976) (Citations omitted).

The interest secured to Appellee by his license is his right to earn a livelihood within the State of New York. But for the continued vitality of his license, Appellee would be denied the right to train harness horses entered in contests on racetracks within the State. Suspension of Ap-

pellee's license, such as the fifteen (15) day suspension herein sought to be imposed, can so seriously impede the licensee's ability to earn a livelihood as to amount to an irrevocable forfeiture. For, as set forth in Appellee's affidavit (p. 25a et. seq.) the horses entrusted to his care cannot compete in races without a trainer for even a short period. The owners, during the licensee's suspension must make provision for competitor trainers to take over the care of the animal, as there cannot be even a short hiatus in the routine and care of the horse. Oftimes such owners do not return to the original trainer but continue with the alternate since frequent changes in trainers, and hence in training techniques utilized, can adversely affect the animal. The suspension so imposed thereby causes an irrevocable loss in clientele. Additionally, such suspension carrying with it of guilt, deters potential clients from utilizing the services of the trainer.* The loss of clientele and the loss of earnings from purse moneys can neither be evaluated nor recouped. There is no statutory provision nor common law remedy which permits a trainer erroneously deprived of his license to recover these monies from the State. The loss of revenue and irrevocable impairment to the trainer's reputation is the type of protected interest which this Court has consistently held requires license suspension to be preceded by a meaningful opportunity to be heard and to refute the charges levied.

The right to earn a livelihood is so fundamental it requires sensitive due process considerations. While a government employee may be suspended from his employ-

*Most importantly, no horse for which the licensee is the trainer of record may be entered in a race during the period of license suspension. (29a) The trainer is thereby absolutely divested of his shares of the purse money which might have been earned by those of his horses placing first through fifth in races, but for the suspension (25a).



ment prior to a full evidentiary hearing, since vindication brings with it restitution of back pay. Even there, the procedures provided include notice of the action sought, a copy of the charge, reasonable time for filing a written response, and an opportunity for an oral appearance. *Arnett v. Kennedy,* 416 U.S. 134, 142 (1974). Only where restitution can be assured should a subsequent hearing prove a suspension to be erroneous, will the Fourteenth Amendment tolerate less than a full evidentiary type hearing where the right to earn a livelihood is at stake.

As Judge Friendly has written, when the State seeks "to deprive a person of a way of life to which he has devoted years of preparation and on which he and his family have come to rely," it should be required first to provide a "high level of procedural protection."[8]

In the case at bar, John Barchi was merely notified of the charge that a horse entrusted to his care had shown the presence of "Lasix" in its system, allegedly administered within forty-eight hours of a race on June 22, 1976 (29a). This "finding" was purportedly based on tests conducted on a urine sample asserted to have been taken from the horse "BE ALERT," after the race. Appellee was never shown the results of the testing, he was not informed as to the identity of the lab or persons who conducted the test; the chain of custody of the urine sample from the time it was taken until the time it was received by the lab was not explained; and the conditions under which the test was conducted, as well as the nature of the test performed, were not explained. The risk of an erroneous finding is patent. With no opportunity afforded to contest or even force disclosure of the accuracy of the testing procedure used, of the chain of custody of the urine sample, of the means used to transport the sample or the procedure used

8. Note: Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1296-1297 (1975) (revocation of professional licenses).

in handling it, or whether or not the sample had even been drawn from "Be Alert." More importantly, the "finding" is in fact founded upon an inference that the results of the testing presumptively establish the injection of the drug within a forty-eight hour period prior to the race. At no point was Appellee ever shown or given the opportunity to contest the inference so established, allegedly founded upon chemical expertise. The "findings" upon which Barchi's license was to be summarily suspended for a fifteen (15) day period represents a conclusion drawn from evidence never revealed.

> "Fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . " "Secrecy is not congenial to truth seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Anti-Fascist Comm. v. McGrath,* supra. at 170, 171-172, (Frankfurter, J. concurring).

Due process has required that a prior hearing is necessary to suspend a student from public school for disciplinary reasons. *Goss v. Lopez,* 419 U.S. 565 (1975). The right to earn a livelihood is deserving of more sensitive treatment.

Appellants have suggested no case, where the right to earn a livelihood, has been curtailed, without a prior evidentiary hearing, with Constitutional approval unless a provision for restitution is woven into the statutory scheme. Indeed, it would be unthinkable to suggest that the license of a lawyer could be suspended without prior notice of charges and opportunity for a hearing to defend himself. *In re Ruffalo,* 390 U.S. 544 (1968); *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1956), Section 90



(6),[9] New York State Judiciary Law. Nor may the license of a physician be suspended without the same prior due process safeguards. Section 6510, Education Law.[10] Although Appellants seem to try to justify their insistence upon the right to summarily deprive licensees under their jurisdiction, by virtue of public interest, it is doubtful that a harness racing trainer, disserves the public welfare to a greater extent than a lawyer, physician or other professional accused by their licensing authorities of wrongdo-

9. Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. In all cases where the charges are served in any manner other than personally, and the attorney and counsellor-at-law so served does not appear, an application may be made by such attorney or in his behalf to the presiding justice of the appellate division of the supreme court to whom the charges were presented at any time within one year after the rendition of the judgment, or final order of suspension or removal, and upon good cause shown and upon such terms as may be deemed just by such presiding justice, such attorney and counsellor-at-law must be allowed to defend himself against such charges.

10. *§6510. Proceedings in cases of professional misconduct*

In cases of professional misconduct the proceedings shall consist of (1) prehearing procedures by the education department, (2) hearing procedures by the committee on professional conduct for the particular profession, (3) decision procedures by the board of regents, and (4) review procedures by the appellate division of the third judicial department, as follows:

1. Prehearing procedures.

a. Complaint. A complaint of a licensee's professional misconduct may be made by any person to the education department.

b. Investigation. The department shall investigate each complaint and if the department and the committee on professional conduct for the particular profession decide that a hearing is warranted, the department shall request the attorney general to prepare the charges.

c. Charges. Upon such request the attorney general shall prepare the charges if he decides that a hearing is warranted. The charges shall state the alleged professional misconduct and shall state concisely the material facts but not the evidence by which the charges are to be proved.

ing. Yet, in the case of the latter professions, the right to a hearing prior to license suspension or revocation is so ingrained into our system of due process of law, that no case has been discovered where an attempt has been made to deprive such professional of his livelihood without a prior hearing. It is submitted that a doctor or lawyer or other professional accused of some wrongdoing is a graver threat to the welfare of the community than a race horse trainer, who allegedly violates an administrative regulation.

Every argument offered by Appellants to try to justify their claimed right to economic life and death over their licensees must fall with careful analysis. The sequence of the suspension of Appellee contradicted any claim by the New York State Racing & Wagering Board to a need for emergency power. The suspension merely assuaged the frustration of an administrative agency that could not solve a mystery by secret proceedings, and therefore, desperately reached out for a scapegoat.

On June 22nd of 1976, "BE ALERT", the horse trained by Appellee, placed second in the third race at

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d. Notice of hearing. The department shall set the time and place of the hearing and shall prepare the notice of hearing. The notice of hearing shall state (1) the time and place of the hearing, (2) that the licensee may file a written answer to the charges prior to the hearing, (3) that the licensee shall appear personally at the hearing and may be represented by counsel, (4) that the licensee shall have the right to produce witnesses and evidence in his behalf, to cross-examine witnesses and examine evidence produced against him, and to have subpoenas issued in his behalf to require the production of witnesses and evidence in manner and form as prescribed by the civil practice law and rules, (5) that a stenographic record of the hearing will be made, and (6) such other information as may be considered appropriate by the department.

(e) Service of charges and of notice of hearing. A copy of the charges and the notice of hearing shall be served on the licensee personally by the department at least fifteen days before the hearing. If personal service cannot be made after due diligence and such fact is certified under oath, a copy of the charges and the notice of hearing shall be served by registered mail to the licensee's last known address by the department at least twenty days before the hearing.



Monticello Raceway. Two days later, on June 24th, Appellee was given oral notice by John F. Fay that a urine test of the horse indicated the presence of the drug "Lasix" in violation of the Rules of Appellant that prohibits treatment with any drug or medicant within forty-eight hours of a race. Appellee insisted that he knew nothing about the incident and on the 28th day of June, 1976, at his own expense, he engaged a private lie detection laboratory, making the written report available to Appellant, to wit; findings that he had spoken truthfully when he denied any knowledge of the occurrence. The next day, Appellants requested Appellee take a lie detector test administered by Appellant, which he did, with another result favorable to Appellee.

On July 10, 1976, a full eighteen (18) days after the race, that had undoubtedly been forgotten by those who attended the event, Appellants decided to suspend Appellee. The explanation for the eighteen (18) day delay is set forth in the affidavit of its counsel, John M. Dailey:

> "In Barchi's case, an unsuccessful attempt had been made to determine the actual party responsible for drugging his horse. When this proved impossible, Barchi was suspended on the basis of his trainer's responsibility. . . . Immediate action was necessary in view of the (need) to protect the integrity and reputation of the sport and to insure public confidence." (33a)

The difficulty is that "immediate action" was not taken in this case. Why Appellants could not have commissioned a hearing officer to try the issues and/or defer execution of punishment until a final administrative decision was made, is difficult to comprehend. And why the need to rush to judgment is likewise difficult to comprehend. It is submitted that the suspension of Appellee was not an exercise of emergency action to serve the public, but rather the exercise of peremptory power to vindicate the om-

nipotence of an administrative agency. No one is served by secret proceedings which bear an exceptionally high risk of erroneous deprivation.

It must be stressed that there should be no inference of negligence on the part of Appellee that can be rationally drawn from the improper medicating of a horse. Before a licensee should be presumed liable for negligence for improper tampering with a horse, provisions should be made to afford him the right to exclude everyone else from the barn and the paddock, where his horses are housed within the so called forty-eight hour prohibited period.

Racing officials and employees of the track, as well as other owners, trainers and grooms, all have free access to the barns and to the paddock. Appellee should not be held responsible since he does not enjoy any authority nor ability to exclude them.

Oftentimes, even members of the public enjoy free access privileges. The affidavit of John Barchi points out that a trainer cannot rationally be presumed liable for negligence where there has been tampering with the horse, when so many people have free access to the animal. (27a).

It must also be stressed, that the rules[11] do not prohibit the use of lasix on a horse, but only its use within forty eight hours of the race. Thus, a hearing would not be the pro forma plea for leniency as in *Dixon v. Love,* 431 U.S. 105 (1977), where a license suspension was based upon a designated number of traffic infractions, within a specific period of time, all of which were tested or could have been tested, at a trial. The Court wrote in *Dixon:*

> "Since appellee does not dispute the factual basis for the Secretary's decision, he is really asserting the right to appear in person only to argue that the secretary should show leniency and depart from his own regulations. Such an appearance might make the licensee feel that he has received more personal attention, but it would not serve to protect any substantive rights." (at p. 113-4)

11. See 4120.4(d) at 2 supra.



In the case at bar, a hearing would put in issue the charges against Appellee, which he has loudly denied.

It was this type of distinction that impelled the *Dixon* Court to point out the risk of an erroneous deprivation in the absence of a prior hearing there, was not great.

In the case at bar, the risks of an erroneous and devastating deprivation outlined above are coupled to a right so vital and essential that the circumstances cannot justify the curtailment of a very high level of procedural protection.

While in *Dixon,* the Court took pains to point out that the right to drive a motor vehicle for pleasure is not so great that it may not be revoked or suspended without a hearing, recognizing the provision in the Illinois regulatory scheme for a limited license for those who must drive in order to gain their livelihood:

> "Unlike the social security recipients in *Eldridge (Matthews v. Eldridge,* 424 U.S. 319, 1976), who at least could obtain retroactive payments if their claims were subsequently sustained, a licensee is not made entirely whole if his suspension or revocation is later vacated. On the other hand, a driver's license may not be so vital and essential as are social insurance payments on which the recipient may depend for his very subsistence. . . . The Illinois statute includes special provisions for hardship and for holders of commercial licenses, who are most likely to be affected by the deprival of driving privileges. . . . We therefore conclude that the nature of the private interest here is not so great as to require us to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action." (at p. 113)

The right to earn a livelihood is so "vital and essential" that the only possible justification for its curtailment prior to a hearing, would be under circumstances providing for restitution. However, since such restitution is not available for a trainer, his license should not be suspended with less than the safeguard of a prior hearing.

Indeed, the loss of perspective of Appellants is best reflected upon their reliance upon *Ingraham v. Wright,* 430 U.S. 651 (1977), a case in which this Court held that the Constitutional right involved was not so great, as to require a hearing prior to the infliction of reasonable corporal punishment upon a student. The Court again outlined the test that must be applied to determine whether the Constitutional right claimed requires a hearing prior to any infringement:

> "Whether in this case the common law remedies for excessive corporal punishment constitute due process of law must turn on an analysis of the competing interests at stake, viewed against the background of 'history, reason, [and] the past course of decisions.' The analysis requires consideration of three distinct factors: 'first, the private interest that will be affected . . . second, the risk of an erroneous deprivation of such interest . . . and the probable value, if any, of additional or substitute procedural safeguards, and finally, the state interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (at p. 675)

It is of significance to note that New York law does require a hearing subsequent to the imposition of a suspension upon a licensee but without any provision for a stay until final decision. Yet, Appellant has shown no valid or real reason why such hearing cannot precede disciplinary action. The interest advanced by the government, that of insuring the integrity of the industry, is not diminished, for they retain the power to discipline those found to have violated the appropriate rules of racing, after a hearing.



To protect the integrity of racing, the same administrative machinery already available can provide a prompt hearing and determination. Therefore, there are no real burdens to be placed upon the State in requiring a pre-suspension hearing. The claim of Appellants to a need for summary suspension powers is without merit and is illusory. In the case of violations of the rule against medicating a horse within forty-eight hours of a race, it takes from two to three days for a laboratory report, so that spontaneous suspensions rarely, if ever, are imposed. Indeed, by the time a suspension is usually effected, the race that gave rise to it, has long been forgotten by the public. It is respectfully submitted that the anachronistic power of economic life and death over its licensees to which Appellants have stated such heated claim, serves no more than the political perogative of the official hierarchy that rules the racing industry with an iron hand.

In *Morrissey v. Brewer,* 408 U.S. 471 (1972), in measuring the quantity of due process required for parolees charged with violation of the terms of their conditional release from incarceration, this Court, while requiring a preliminary hearing to determine probable cause for their arrest, did not criticize the sequence of first taking a parolee into custody prior to the required due process hearing machinery. However, the rights of a parolee are limited, having been afforded the privilege of conditional release under strict supervision from incarceration, prior to the termination of his sentence. For Appellants to seek to equate the quantity and quality of due process afforded to convicted criminals with that which they advocate for their licensees only reflects their unhealthy attitude that horse racing licensees are little more than criminals whose

rights to earn a living are not entitled to the same protection as licensees in other professions and occupations.

Indeed, this Court has held that a prior hearing on the issue of liability is essential even where the right involved is not entitled to the same degree of protection as the right to earn a livelihood, as in the case at bar. Thus, the Georgia statutory scheme for revocation of a driver's license of a driver involved in an accident, who fails to post a bond to secure recovery of an eventual judgment by the party injured, was held to be Unconstitutional, where there was no opportunity for the licensee to litigate prior to revocation, the issue whether there was probable cause to believe that he was liable for the accident and thus, might in fact be called upon to respond in damages. "Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. . . . This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.' . . . Since the statutory scheme makes liability an important factor in the State's determination to deprive an individual of his license the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing. . . . It is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford notice and opportunity for hearing appropriate to the nature of the case before the termination becomes effective." *Bell v. Burson,* 402 U.S. 535, 539, 541, 542 (1971). Appellants have failed to make



any showing of a continuous emergency eighteen (18) days after the incident charged to Appellee that required a summary suspension of his right to earn a livelihood, without a prior hearing to determine whether he was guilty of misconduct to justify such drastic action.

In circumstances more akin to these, this Court has required a full evidentiary hearing prior to the drastic and devastating termination of benefits to needy individuals. *Goldberg v. Kelly,* 397 U.S. 254 (1970). Yet while the machinery already exists to adequately provide such procedural safeguards, the State stubbornly insists that they not be made available until a point in time when they are meaningless and further that draconian administrative power is absolutely essential. In *Hubel v. West Virginia Racing Commission,* 513 F.2d 240 (4th Circ., 1975) the Court did not take into account the States that require a hearing before license suspension, where horse racing nevertheless prospers. Thus, there is no necessity for the drastic summary procedures assumed by Appellants. Absent a proven necessity, due process is violated by punishment without opportunity for a prior hearing. The plea of Appellants is unworthy of serious consideration.

In *Ruane v. New York Racing and Wagering Board,* 532 F.2d 860 (2nd Circ., 1976), where the Court upheld small fines levied against licensees prior to a hearing, it must be noted that the parties did have an adequate remedy at law, to wit, restitution should a subsequent hearing vindicate them. Moreover, *Ruane* must be distinguished in that the fines imposed did not impair the rights of the licensees to earn a livelihood.

In, *Cafeteria and Restaurant Workers Union v. McElroy, supra,* this Court took great pains to point out that the right to earn a livelihood was not at stake.

> "All that was denied her was the opportunity to work at one isolated and specific military installation." Moreover,

> the governmental function operating here was not the power to regulate or license, as lawmaker, an entire trade or profession or to control an entire branch of private business, but, rather, as proprietor, to manage the internal operation of an important federal military establishment." (at 895-96) . . . "There is nothing to indicate that this determination would in any way impair Rachel Browner's employment opportunities anywhere else (at 898-899)."

The suspension of Appellee bars him from working as a competing trainer anywhere in the United States or Canada and thus in that sense is an important factor which significantly distinguishes the situation at bar from that presented in *Cafeteria Workers.*

It has never been seriously urged by Appellants that Appellee is not entitled to a hearing on the charges of misconduct against him, but rather, it is their position that a hearing subsequent to the imposition of his suspension satisfies due process of law. Where important Constitutional rights are at stake—and the right to earn a livelihood has never been challenged as one of them—opportunity for a hearing subsequent to the impairment of the right has never been held to be Constitutionally sufficient. To support such proposition, Appellants would have this Court accept a presumption that all licensees in the racing industry charged with misconduct, are guilty—a presumption that is unsupported by any rational connection and is Constitutionally repulsive. *Stanley v. Illinois,* 405 U.S. 645 (1972); *Armstrong v. Manzo, supra.*

Appellant refers to *Gilmour v. New York State Racing & Wagering Board,* 405 F. Supp. 458 (S.D.N.Y., 1975), in urging that appellee was afforded "some kind of hearing" when summoned before Presiding Steward Fay and given notice of the charges against him, which should satisfy due process of law, within the meaning of Gilmour.



However, in the *Gilmour* case, the licensee had been suspended by the race track, not the NYSRWB, as the title of the action might indicate. The Court upheld the suspension, but based upon a breach of contract by Gilmour. Gilmour had agreed to cooperate in any investigations concerning wrongdoing at the tracks, in consideration for being permitted to race there. However, he allegedly failed to follow through on his agreement. Indeed, *Gilmour* was given notice of his reticence and race track officials confronted him with his failure to do what he had promised. He had full opportunity to confront his accusers and to offer evidence on his behalf, albeit informally. This must be contrasted from Appellee's situation, where what he was given by the Presiding Steward was not "some kind of hearing," but rather only "some kind of notice," of the charges against him. He was never confronted with the laboratory samples, nor given opportunity to challenge the accuracy of the testing or even the accuracy of the claim that the sample was, in fact, obtained from the urine of "Be Alert." Nor was he given opportunity to demonstrate that he did not have exclusive control of the horse. In short, it is important that any impression that Appellant has sought to create that Appellee might have been given "some kind of hearing" is dispelled. Moreover, it must be carefully noted that there was no emergency to justify summary suspension, since Appellee was not suspended until a full eighteen (18) days after the event.

In a companion case, *Daigneault v. Sarafan,* 76 Civ. 3698 G.L.G., S.D.N.Y., Sept. 9, 1976, the plaintiff had declined a hearing that had been offered to him prior to the institution of his lawsuit for two reasons. The fact was that the offer of a hearing was in the face of a refusal of a stay. Since the Board has thirty (30) days to render a decision, and additionally has the requirement of transcript

availability prior to decision making, Daigneault would have served his suspension before the administrative review process would have run its course. Secondly, Daigneault was charged with a violation of Rule 4117.4(p)[12] of the Rules of the New York State Racing & Wagering Board, authorizing punishment for a licensee accused of "driving with indifference." The vagueness of the rule and the charge rendered it almost impossible to defend and so, Daigneault elected to challenge the Constitutionality of the rule. Any impression that Appellant has sought to make that administrative stays pending administrative review will invariably be granted, where there is reasonable grounds to issue one, must be dispelled by *Manzi v. Barry,* 77 Civ. 4680 HFW S.D.N.Y., where these same Appellants argued that the issuance of a stay of suspension is prohibited by Section 8022. When Judge Werker followed *Barchi v. Sarafan,* 436 F. Supp. 775 (S.D.N.Y., 1977), and stayed the enforcement of a suspension issued without a prior hearing, Appellant moved the United States Court of Appeals for a stay of the order of the Court below pending Appellate review, on grounds that Section 8022 of the Unconsolidated Laws of the State of New York prohibits a stay of suspension pending an administrative hearing, which application was denied on September 30, 1977. It therefore ill behooves Appellant to suggest in this Court that it does not follow Section 8022 to the letter, when the very reason for this litigation is that it has done so in Appellee's case and invariably does so in all cases.

It is finally submitted that the vitality of *Hubel v. West Virginia Racing Comm., supra,* has been exhausted by the subsequent decision of *Matthews v. Eldridge,*

12. 9 NYCRR 4117.4(P) Racing Violations. The following shall be deemed racing infractions: (p) Driving with indifference or lack of effort.



*supra.* The *Hubel* decision turned on State interest in summary execution of its suspension powers, without taking into account any of the other criteria enunciated in *Mathews.*

In *Hubel,* the Court failed to take into account the Constitutional importance of the private interest in the right to earn a livelihood involved and "the risk of an erroneous deprivation of such interest," to wit, the irreparable injury resulting from an erroneous decision to summarily suspend a licensee. In short, the doctrine of *Matthews,* coupled with the practicalities of racing, clearly indicate that the State interest can be served by delaying the imposition of a suspension or revocation until a hearing be afforded a licensee. Indeed, the solution is promptness in the hearing and decision process, rather than the hasty imposition of punishment, without proper consideration.

In *Tappis v. New York State Racing & Wagering Board,* 36 N.Y.2d 862 (1975), the New York Court of Appeals upheld the procedures provided by Section 8022. The Court indicated that public policy required such summary power in the hands of the racing authority to maintain the integrity of the sport. However, in *Gerard v. Barry,* 59 A.D.2d 901 (2nd Dept., 1978), the Appellate Division, Second Department upheld the ruling of Nassau County Supreme Court, which followed *sub nom. Barchi v. Sarafan,* 436 F.Supp. 775 (S.D.N.Y. 1977), by declaring the suspension of a licensee without a prior hearing violative of due process of law. Appellant has urged that the Appellate Division, Second Department was in error, in reaching the conclusion it did, pointing out that an application was pending for leave to appeal to the New York Court of Appeals. Since preparation of Appellant's brief, the New York Court of Appeals denied such requested leave to appeal. It would therefore seem that the

New York Court of Appeals has overruled *Tappis* based upon *Barchi*, leaving Appellant with a specious argument that State Law should be upheld, which now seems to have been repudiated by State Courts, relying upon the decision below, now under appeal herein.

## POINT TWO

## SECTION 8022 OF THE UNCONSOLIDATED LAWS ALSO VIOLATES EQUAL PROTECTION OF LAW BY PROHIBITING STAYS OF SUSPENSIONS FOR HARNESS RACING LICENSEES PENDING ADMINISTRATIVE REVIEW THAT ARE NOT PROHIBITED TO THOROUGHBRED RACING LICENSEES

Both Harness Racing and Thoroughbred Racing fall within the supervising jurisdiction of the NYSRWB. However, unlike, Section 8022 of the Unconsolidated Laws of the State of New York, Section 7915 of the Unconsolidated Laws, the statute that outlines the procedure for thoroughbred license revocation or suspension, does not restrict the issuance of stays of punishment, pending administrative review. Section 8022 is substantially identical to 7915, excepting the absence in the latter of prohibition of stays of execution of suspensions and revocations pending review. (J.S. 17a). The comparative language of the two statutes is clear and unambiguous requiring no State court interpretation for construction. *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964); *Carey v. Sugar,* 425 U.S. 73 (1976).

Appellant has vaciliated between two "unique" explanations to attempt to justify the difference in procedure for the two classes of licensees, albeit in the racing industry. *Barchi v. Sarafan,* 436 F.Supp. 775 (S.D.N.Y.



1977). In the Court below, appellants took the position that there is more corruption in harness racing than thoroughbred racing and therefore, the State legislature was justified in applying more draconian punishment procedures in regard to its regulation. However, Appellants were doomed to fail in any effort to try to prove the scandalous accusation, which apparently is symptomatic of their contempt for those who earn their livelihood in harness racing. The Court below noted that the defendants had not come forward with any proof concerning their bare assertion of greater corruption in harness racing to justify the need for the difference in treatment effected by Sections 7915 and 8022 (J.S. 18a). An isolated instance of labor trouble cited by Appellant does not support an inference of wholesale corruption in the harness racing industry. Even had the Court below accepted the unsupported assertion of greater corruption, there was no proof that the availability of summary proceedings could better control the probabilities of corruption.

> A legislative classification must contribute substantially to the achievement of the state's purpose. . . . [G]rossly overinclusive or underinclusive classifications should not readily be tolerated. Nor should a reviewing court defer to imaginable facts that might justify the classification. But account should be taken of legislative realities and the need for legislative flexibility. In short, a legislature should be able to adopt any means that are reasonably effective in achieving a valid legislative end or ends. *Boraas v. Village of Belle Terre,* 476 F.2d 806, 821-22 (2 Cir. 1973)(dissenting opinion), *rev'd,* 416 U.S. 1, (1974).

Appellants now urge that this Court need not reach the Equal Protection claim, since they have elected to disregard the prohibition in Section 8022 and at times will grant a stay of execution of punishment, pending ad-

ministrative review. Research has failed to disclose any precedent for State officials to urge this Court to avoid reaching a decision on the Constitutionality of the State statute by making a claim that they sometimes ignore the command of the enactment anyway and therefore, judicial energies should not be expended in reviewing the enactment. It is strongly submitted that the position of Appellants is less than sincere. Otherwise, they would pose no objection to the declaration of the unconstitutionality of the prohibition that they grudgingly concede in this Court is unconstitutional, coupled with a plea that it not be nullified to undoubtedly maintain it in its arsenal of administrative weaponry to be applied where it deems necessary.

In any event, it is undisputed that Section 8022 has been applied against Appellee, who has not been given a stay, pending administrative review, and therefore, he has standing to challenge a State procedure that denies him, because of his membership in a specific class, equal protection of law. *Brown v. Board of Education,* 347 U.S. 483 (1954).

The Equal Protection Clause necessarily limits the authority of a State to draw such legal lines as it chooses. *Stanley v. Illinois,* 405 U.S. 645 (1972). This is not to say that the State may not create classifications for differing treatment, where it can support its decision with a rational basis. *Boraas v. Village of Belle Terre,* 416 U.S. 1 (1974).

It is not the province of this Court to create substantive Constitutional rights in the name of guaranteeing equal protection of the laws. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973). However, the right to pursue an occupation is a fundamental Constitutional right, a proposition with which no serious quarrel can be anticipated. *Meyer v. Nebraska, supra.* Therefore, to single out one class of an occupational



phylum and to legislate a prohibition of the right of members of the class to pursue their occupation when charges of administrative violation are leveled against its members and prior to a hearing, while freeing a second class of the same phylum from such unduly harsh treatment is a violation of the Equal Protection Clause of the Fourteenth Amendment, unless the State can carry a heavy burden to justify such disparate treatment. Here the State has failed to make any effort to meet its burden. (J.S. 18a-19a).

The right to earn a livelihood cannot be classed as insubstantial. *Montayne v. Haymes,* 427 U.S. 236 (1975).

If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. ". . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Dandridge v. Williams,* 397 U.S. 471 (1970). However, for the State to seek to justify disparate procedures adopted for two classes of horse racing licensees by first making an irresponsible and unsupported claim that the class treated more harshly has been traditionally more corrupt, and then when put to the test, being unable to offer proof in support of so scandalous an accusation, now urges that the statute is often not followed, merely adds substance to the argument of Appellee. As pointed out, he has standing to challenge the disparate treatment authorized by the Legislature, since he has been a victim of the arbitrariness by the denial of a stay, pending an administrative hearing on the charges lodged against him. To urge that the challenged statutory discrimination should be upheld because it is *often* disregarded, is to advocate a strange rule of law that would neutralize *any* Equal Protection of

Law challenge. Therefore, the test to be applied in evaluating the equal protection claim is whether or not the classification has a reasonable basis. *Shapiro v. Thompson,* 394 U.S. 618 (1969). It is strongly urged that Appellants have failed to even attempt to prove a "rational connection" for the legislative election to treat harness racing licensees more harshly than their counterparts in the thoroughbred racing industry, and therefore, the sustantive distinction created by the legislature violates Equal Protection of Law. *Allen v. County Court, Ulster County,* 568 F.2d 998 (2nd Circ., 1977).

The denial of stays pending review in harness racing constitutes a denial to Appellee of Equal Protection of Law.

## POINT THREE

### THE TRAINER'S RESPONSIBILITY LAW VIOLATES DUE PROCESS OF LAW BY REASON OF THE LACK OF RATIONAL CONNECTION BETWEEN THE ABSOLUTE RESPONSIBILITY IMPOSED UPON A TRAINER AND MISCONDUCT —WHETHER BY WAY OF INTENTIONAL WRONGDOING OR NEGLIGENCE—TO BE INFERRED FROM THE DRUGGING OF A HORSE.

In striking down Section 8022 of the Unconsolidated Laws of the State of New York as unconstitutional, the three judge Court below, nevertheless found that the "Trainer's Responsibility Law" is constitutional and the presumption that it creates does not offend Due Process of Law:

> "The Court finds that the duty of a trainer to oversee his horses is sufficiently connected to the occurrence of



> tampering to support the presumption established by the trainer's 'insurer' rules. The state's definition of trainer responsibility is reasonably related to the interests involved and, given the rebuttable nature of the 4120.5 presumption, the high standard of accountability is not unconstitutional. Whether the application of the rules in plaintiff's case was constitutionally proper is not a matter we need consider in light of the absence of an opportunity for meaningful administrative review." (J.S. 20-21a).

Appellants have merely addressed themselves to the issues created by the declaration of the unconstitutionality of Section 8022, without attempting to support the three judge Court's decision to uphold the constitutionality of Rule 4120.5, despite the fact that the appeal taken by Appellants brings before this Court the ruling of the three judge Court upholding the constitutionality of the Trainer's Responsibility Rule.

Appellee has standing to challenge the ruling of the Court below, where prejudicial to him, since he is in jeopardy that the Trainer's Responsibility Rule, will be applied against him at an administrative hearing. Under such circumstances, the decision of the Court below upholding this administrative rule should be reviewed by this Court. *California v. LaRue,* 409 U.S. 109 (1972). The viability of the regulation calls for judicial pronouncement, lest the silence of this Court be misconstrued as approval of the three judge Court ruling, thereby unnecessarily running the risk of confusion in its application. *Bellotti v. Baird,* 428 U.S. 132 (1977).

It is possible that the presumption might be acceptable were the maximum penalty exposure a small fine. However, where there is a possibility of license suspension or revocation in its application which will cause irreparable damage, such type presumption must pass a rigid test of constitutionality to determine whether there is

a rational connection between the proven fact and the conclusion required by law to be drawn therefrom.

The purpose of the Trainer's Responsibility Rule is to insure the integrity of racing through the harsh device of imposing liability upon the trainer, without proof of fault, to assure that no medications are administered to the animal within forty-eight hours of the race. The Rule comes too close to imposing absolute liability as an insurer upon a trainer. The burden, however, is unacceptable in a quasi-criminal regulation, the violation of which carries with it the draconian possibility of the party to be charged being barred from earning a livelihood in his chosen occupation. In *Re Ruffalo,* 390 U.S. 544 (1968). In *People v. Fitzpatrick,* 32 N.Y. 2d 17 (1973), the New York Court of Appeals offered the suggestion that some presumptions serving the convenience of administration may be tolerated where the penalty is minimal; but not where the result can be as dire as in the case at bar, to wit; the loss of one's right to earn a livelihood, by license revocation or suspension.

> "Although no Courts have made the distinctions it would seem that in sustaining legislatively enacted presumptions one must look to counterbalancing factors. It is one thing to have presumptions in crimes punishable by long imprisonment, or even capital punishment. It is another to utilize presumptions on minor crimes and offenses where the policing problem is aggravated and the escape of responsibility by studied ignorance or denial too easy." (at p. 25).

It is submitted, however, that the burden may not be Constitutionally sheltered, absent a rational connection between the conclusion to be drawn from the fact proven, where the consequence may be a license revocation or



suspension, depriving or impairing the licensee's right to earn a livelihood.

The Trainer's Responsibility Rule raises a presumption that the drugging of a horse prior to a race resulted either from the intentional act of wrongdoing by its trainer or as a result of his carelessness guarding the horse entrusted to him. In the affidavit of John M. Dailey, counsel to the New York State Racing & Wagering Board, the latter set forth the basis for the summary suspension of Appellee.

> "In Barchi's case, an unsuccessful attempt had been made to determine the actual party responsible for drugging his horse. When this proved impossible, Barchi was suspended on the basis of his trainer's responsibility." (33a)

In his affidavit sworn to the 1st day of September, 1976, Joseph A. Faraldo answered Mr. Dailey:

> "In the instant case, John Barchi's horse, Be Alert, was given a pre-race blood test in the paddock by officials of the New York State Racing and Wagering Board. This test his horse passed. During the three or four hour period that this horse was in the paddock, he was subject to intense security supervised by the State of New York.
>
> I respectfully submit that from this fact the State of New York is as responsible a party if not more so, than they claim John Barchi to be." (38a)

Undoubtedly, New York State Racing & Wagering Board investigators were unable to determine the responsible party for the drug that was administered to "BE ALERT", by reason of the huge number of people that had access to the barn, as well as the paddock, where "BE ALERT" was kept during the crucial forty-eight hour period that preceded the race. Race track employees and owners, trainers, grooms, even officials from the New

York State Racing & Wagering Board had free access to those areas and unlimited opportunity to administer Lasix to the horse, if such were indeed done, were any of them bent on mischief. More than that, members of the public enjoyed the same access to those areas. They need only enter the premises in the presence of any licensee or with his approval. Thus, there is no real rational connection between the fact to be presumed, to wit; that the trainer of the horse was guilty of either intentional misconduct or negligence from the fact proven, alleged drug presence in the horse's urine. It may well be that the application of the presumption serves the convenience of the administrative agency, but as was held in *Tot v. United States,* 319 U.S. 463 (1943), that is not sufficient. In every case where statutes imposing strict liability have been upheld, such liability was predicated upon proof that the party subjected to such liability was in exclusive control of the agency which caused the injury from which the damage resulted. Barchi did not enjoy such control. The racetrack itself and the New York State Racing & Wagering Board maintain a full time security force that is duty bound to maintain the integrity of the horse, which failed, putting the blame on the Appellee. McKinney's Unconsolidated Laws, Section 8012. For a presumption that has such serious consequences to be upheld, it must be determined by the Court that it is more likely than not, that the fact to be presumed flows smoothly from the fact proven. *Allen v. County Court, Ulster County,* 568 F.2d 998 (2nd Circ., 1977). In *Allen,* the Second Circuit struck down the longstanding New York State presumption of possession of a firearm by each occupant of a vehicle in which it is found, relying strongly upon *United States v. Gainey,* 380 U.S. 63 (1965), where this Court struck down a presumption that presence at a whiskey still supports an inference of possession of the illegal machinery. In each case, the Court noted that presence, under the circumstances, was



not sufficient to support an inference of knowing possession of the prohibited item.

Applying the same reasoning to the case at bar, it is submitted that the easy access of so many classes of persons to racing stock must inevitably lead to a conclusion that the application of the presumption is irrational and unduly harsh and therefore, the Trainer's Responsibility Rule offends due process of law.

Under the police power reasonable requirements may be imposed, no doubt to protect the public, but they may not be arbitrary, and they must bear a real and substantial relation to the protection they purport to thereby serve. Thus, the New York State Racing & Wagering Board has promulgated a rule creating a Constitutionally unacceptable presumption, to wit, that "it shall be presumed" that a drug administered to a horse within 48 hours of a race was done or caused by a person . . . having . . . custody . . . of such horse with the intent thereby to affect the speed or condition of such horse" Rule 4120.5 and that "a trainer is (therefore) responsible for the condition, fitness, equipment and soundness of each horse at the time it is declared to race and thereafter when it starts to race." Rule 4116.11. See, also Rule 4120.6. The rules allow for an inference that a trainer has caused a horse to be drugged, on the mere happenstance of the event, and thereby, produces the irrational and unfair possibility of punishment of the innocent. Although several states have wisely struck down the statutory presumption that imposes the liability of an insurer upon a trainer (*State ex rel Paoli v. Baldwin,* 159 Fla. 165, 1947; *Mohoney v. Byers,* 187 Md. Repr. 81, 1946, *Brennan v. Illinois Racing Board,* 42 Ill. 2d 352, 1969). Other States have upheld the harsh statutory presumption on grounds of compelling State need, in the regulation of horse racing. (*Jamison v. State Racing Comm.,* 84 N.M. 679, 1973, *Sandstrom v. California*

*Horse Racing Board,* 31 Cal 2d 401, 1948). States such as Illinois, Florida and Maryland have been able to live with horse racing, without Martial Law over horse trainers, as other States *claim* is necessary to protect the public interest. The history of Illinois, Florida and Maryland show such unfair rigidity to be unnecessary. The right to practice a profession or occupation is Constitutionally protected. *Slochower v. Board of Higher Education of New York,* 350 U.S. 551 (1956).

It has been held that a proceeding that will tend to pin a badge of disgrace upon a person, must be cloaked with due process safeguards. *Wisconsin v. Constantineau,* 400 U.S. 433, (1971). The legalization of horse racing cannot be used to label horse trainers second class citizens. Their rights to practice their occupation are no less entitled to protection than any other calling and any statutory scheme that will unfairly tend to revoke the license of the innocent must be resoundly condemned. It is surprising that any administrative agency would wish to abuse its power and promulgate such rules that serve to punish the innocent, upon the mere happening of an event. It is surprising that more states than the three cited have not resoundly struck down such intolerable administrative legislation.

It is interesting to note that one of the earliest cases that upheld the unfair presumption of trainer liability was *State of West Virginia ex rel Morris v. The West Virginia Racing Commission,* 133 W.Va. 179, (1949). The decision turned on the since discredited doctrine that the right to train horses was a privilege, not a right, and therefore, was not entitled to Constitutional protection. Such rationale is no longer workable. *Graham v. Richardson,* 403 U.S. 365 (1971). Mere legislative fiat may not take the place of due process in the determination of issues involving life, liberty or property. *McFarland v. American Sugar Ref. Co.,* 241 U.S. 79 (1915)



State legislation declaring that proof of one fact or a group of facts shall constitute a prima facie evidence of the main or ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. ". . . It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." *Manley v. Georgia,* 279 U.S. 1 (1929).

It would be unthinkable for the New York State Banking Board to promulgate a regulation that the discovery of an embezzlement from a bank creates a presumption that the crime was committed by the bank president. Yet, many states, including New York, tolerate an analogous rule that a finding that a race horse has been drugged raises a presumption that it was done or caused by the trainer. While there is a need for regulation of horse racing, it cannot be at the expense of arbitrariness and oppressive short cuts. State Legislation making the drugging of a horse a crime, would not be tolerated with such a presumption that the trainer was the guilty culprit. Judicial approval of such statute should not be given, merely because the consequences are not penal. Indeed, the deprivation of the accused's right to earn a livelihood is entitled to just as serious consideration.

The conflict in authority of the various State Courts concerning the tolerability of the statutory presumption makes the issue ripe for Supreme Court review. The pronouncements of the highest State Courts in Illinois, Florida and Maryland call for some effort at uniformity.

As set forth, the New York State statutory scheme is defective in respect to procedural due process. The agency

regulatory scheme is likewise defective, by raising a presumption to be drawn from the fact that a horse has been drugged, that it was done by the trainer or through his negligence. Rules 4120.5, 4120.6 and 4116.11.

Where there is "no rational connection between the facts proved and the ultimate fact presumed," it is Constitutionally defective. Thus, it was held that a statute permitting a presumption to be drawn that a firearm was shipped in interstate commerce from the mere possession of it was held constitutionally offensive. *Tot v. United States,* 319 U.S. 463, (1943). A statutory presumption may not be created to punish without evidence of guilt; *Seales v. United States,* 367 U.S. 203, (1961). It was held that a statutory presumption is invalid that a non-resident student at the time of his enrollment is presumed to remain a non-resident. *Vlandis v. Kline,* 412 U.S. 441 (1973).

To hold a trainer liable for the drugging of a race horse, based upon the mere fact that such event happened, is to overlook the irrationality of the conclusion. It is impossible for any person to stand guard over an animal 24 hours per day.

The regulatory presumption is repugnant and its application should be enjoined.



## POINT FOUR

## THE COURT BELOW WAS CORRECT IN DECLINING TO ABSTAIN FROM REACHING THE CONSTITUTIONAL ISSUES.

The constitutional issues presented by this appeal are clear. Is Due Process of Law violated by a statute that clearly does not *require* notice and opportunity for an administrative hearing to precede revocation or suspension of an *occupational* license? Is Due Process of Law violated by an administrative rule that creates a presumption of liability of a licensed trainer for negligence or intentional wrongdoing, where medication allegedly has been administered to the animal within forty-eight hours of the race, when others including racing officials themselves, employees of the track and even the general public have the same access to the horses as the trainer? The statute and the regulation are not complex and do not require State Court construction or interpretation. Therefore, there is no construction that a State Court can possibly make that would avoid the Federal issue. *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964).

Prior to the pronouncement of the three judge Court in the case at bar, New York had committed itself to a proposition that licensees of the Board were to be treated in a discriminatory manner, thus becoming the only occupation licensed by the State subject to license revocation or suspension, without a prior hearing. In *Tappis v. New York State Racing & Wagering Board, Harness Racing Division,* 36 N.Y. 2d 863 (1975), the Court enunciated its position as follows:

> "The compelling and substantial state interest involved in maintaining discipline among trainers and owners . . . so

as to preclude the appearance or the fact of impropriety, justifies on-the-spot sanctions and penalties in advance of hearings and the procedure . . . followed involved no infringement of petitioner's constitutional rights and complied sufficiently with the requirements of the due process clauses of the Federal and State Constitutions."

The argument advanced by The New York Racing Association Inc. in its Brief amicus curiae that the Court was completely mistaken in its holding that Section 8022 expressly authorizes suspensions without prior or prompt post suspension hearings is incredible.

As set forth above, the New York Court of Appeals found in *Tappis* that Section 8022 and its attendant procedures involved no infringement of petitioner's constitutional rights. The Court below carefully considered the question of whether or not state law was open to question and found that it was not. (J.S. 10-11a). At the Appellate Division level, in *Tappis v. New York State Racing & Wagering Board,* 46 A.D.2d 613 (1st Dept. 1974), the Court therein specifically noted Section 8022's unconstitutionality and the later reversal by the Court of Appeals explicitly upholding its constitutionality left the interpretation of Section 8022 no longer the subject of debate. The highest Court had spoken on the question. To argue that *Tappis* did not even involve Section 8022 is to disregard the Appellate Division decision in regard to Section 8022, L.1940, ch 254, Section 47 as amended. (J.S. 10-11a).

What significance the purported interpretation by the Board had, that it could grant stays, which interpretation was proffered to the Court to discourage its jurisdiction, in view of the clear language of the statute and pronouncement by the State's highest Court is unclear. The experience with the Board has always indicated their outright refusal to grant stays and to insist on punishment first and hearings later, at a time when they were meaningless,



without regard to the risks of error, or irreparable injury to the aggrieved party. (36-40a).

Abstention is proper, only where an issue of *State Law* to be resolved by the State Courts might render it unnecessary to reach the Federal issue.

"In thus expanding federal judicial power, Congress imposed the duty upon all levels of the Federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because State Courts also have the solemn responsibility, equally with the federal courts . . . to guard, enforce and protect every right granted or secured by the Constitution. . . . Though never interpreted by a State Court, if a State statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of its bearing fruit. . . . Abstention cannot be ordered simply to give State Courts the first opportunity to vindicate the federal claim. . . . For the recognition of the role of State Courts as the final expositors of State Law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." *Zwickler v. Koota,* 389 U.S. 241, (1967).

Where there is no possibility of adequate state grounds for avoiding the resolution of the federal question, federal courts may not abdicate their role to interpret federal law, by leaving such interpretation to State Courts. Only where the interpretation of *State Law* might obviate the need to reach the federal question, is abstention suitable.

"Where resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law, absten-

tion may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law and premature constitutional adjudication. . . . The doctrine, however, contemplates that deference to state court adjudication only be made where the issue of state law is uncertain. . . . If the state statute in question, although never interpreted by a state tribunal is not fairly subject to an interpretation which will render unncesssary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction." *Harman v. Forssenius,* 380 U.S. 528, at 534, (1965).

In the case at bar, there is no uncertainty as to State Law applicable. There is no doubt that plaintiff is a target of the statute and regulations under challenge. The only issue is whether the statute and regulations offend equal protection and due process. There is no need for a federal tribunal to defer to a State Court to make such determination. *Baggett v. Bullitt,* 377 U.S. 360, (1964), *Turner v. City of Memphis,* 369 U.S. 350, (1962); *McNeese v. Board of Education,* 373 U.S. 668, ; *NAACP v. Bennett,* 360 U.S. 471, (1959). Abstention does not mean abdication. It means deference to a state tribunal with expertise in state law where necessary. There is no need for deference to a state tribunal to interpret federal law, in that federal courts are endowed with primary jurisdiction for such tasks.

There is no way for the state to construe the statutes and regulations under fire to exclude plaintiff from their summary provisions and thus avoid the constitutional question.

In respect to the Trainer's Responsibility Rule, this appeal presents an issue whether the regulatory presumption is sufficiently rational to satisfy the requirements of due process of law.



Federal Courts have clear cut original jurisdiction to entertain actions brought to vindicate civil rights. *Monroe v. Pape,* 365 U.S. 658 (1961); *Baggett v. Bullitt,* 371 U.S. 360 (1964); *NAACP v. Bennett,* 360 U.S. 471 (1961).

Of course, Federal courts will not interfere with State regulatory schemes, especially where mathematical computations are challenged. It has been held that "if the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams,* 397 U.S. 471 (1970); *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973). The case at bar does not ask this Court to adjudicate the propriety of a complex State mathematical system designed to achieve a required social welfare program.

Moreover, Federal courts will not seek to adjudicate the constitutionality of State enactments capable of a construction that will enable them to pass due process muster. "Abstention is appropriate where an unconstrued state statute is susceptible of a construction by the State Judiciary which might avoid in whole or in part the necessity for Federal Constitutional adjudication or at least materially change the nature of the problem." *Bellotti v. Baird,* 428 U.S. 132 (1977). Where a statute is clear on its face, the Federal issue cannot be avoided.

Nor are any of the other classic reasons for abstention present in the case at bar. There is no competing lawsuit between the parties pending in a State Court where Appellee would have opportunity to litigate the issues herein, that would imnpel a Federal Court to exercise discretion to abstain. *Carey v. Sugar,* 425 U.S. 73 (1976); *Judicie v. Vail,* 430 U.S. 327 (1977).

Probably the most compelling argument against abstention is the adoption by the New York State Courts of the reasoning of the three judge court in the *Matter of*

*Gerard v. Barry,* 59 A.D.2d 901 (2nd Dept. 1978), leave to appeal to the New York Court of Appeals denied and appeal dismissed, N.Y.L.J. June 15, 1978 at p.6 col.2 (June 13, 1978) where the Appellate Division, Second Department affirmed the order of Nassau County Supreme Court Justice Velsor enjoining the same appellants in the case at bar, from enforcing a summary suspension of a licensee, without a hearing. In the *Gerard* case, a licensee was suspended without a hearing for allegedly switching the credentials of two horses. As in the case at bar, it was not an "on-the-spot" suspension, but rather one meted out upon learning of the alleged horse switching. In disapproving of such summary procedure, Nassau County Supreme Court Justice Velsor wrote:

> "The precise question was presented to a constitutionally organized three-judge Federal Court in the most recent case of Barchi v. Sarafan et al (decided August 18, 1977) in the United States District Court for the Southern District of New York. That Court found Section 8022 of the Unconsolidated Laws of New York (applicable to harness racing) unconstitutional on two grounds; the first, by parallel reasoning applicable to the facts of this case, because a licensed trainer was disciplined without either a pre-suspension hearing, or prompt post-suspension hearing. I do not find any substantive distinction which would merit consideration in the perception that Barchi, supra, involved harness racing and the instant case pertains to 'flat' racing. Accordingly, it must be assumed as binding that absent any meaningful difference between revocation and suspension, and between harness racing and 'flat' racing, a disregard or deprivation of procedural due process in affording a licensed employee a hearing with the constitutional safeguards of the right to confront and cross-examine, is an unconstitutional invasion of a citizen's right to due process."



Thus, the New York Courts have elected to follow the ruling of this case by the three judge court, and a decision to abstain would not only work a hardship and injustice on Appellee, but would also work to toss the New York State Judicial response to *Barchi* into utter chaos and confusion.

In respect to the challenge to the New York State administrative agency regulatory system to the extent that it creates a presumption of misconduct by the trainer of a horse, that improper medication of the animal within forty-eight hours of a race resulted from his negligence or intentional wrongdoing, it is beyond civil that Federal Courts have concurrent original jurisdiction together with State Courts to review such type regulations, and an aggrieved party may properly make an election to select the Federal forum for review of the challenged administrative enactment. *California v. LaRue,* 409 U.S. 109 (1972); *Montayne v. Haymes,* 427 U.S. 236 (1976); *Meachum v. Fano,* 427 U.S. 3215 (1976).

## CONCLUSION

**THE JUDGMENT OF THE THREE JUDGE COURT SHOULD BE AFFIRMED AND SECTION 8022 OF THE NEW YORK STATE UNCONSOLIDATED LAWS AND RULES OF THE NEW YORK STATE RACING & WAGERING BOARD INVOKING THE TRAINER'S RESPONSIBILITY RULE SHOULD BE DECLARED UNCONSTITUTIONAL AND NULL AND VOID.**

Respectfully submitted,

GRECO & FARALDO
*Attorneys for Appellee*
125-10 Queens Boulevard
Kew Gardens, N.Y. 114153
(212) 544-6800

JOSEPH A. FARALDO,
*Of Counsel*